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# In the Supreme Court
OF THE
# United States

OCTOBER TERM, 1961

## No. 340

BURGERMEISTER BREWING CORPORATION,
*Petitioner,*

vs.

RICHARD C. LINDSTROM, ARCHIE ALDINI and JOHN P. FOLEY,
*Respondents.*

## BRIEF OF RESPONDENTS IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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## BRIEF OF RESPONDENTS IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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The petition on file herein seeks review of three actions brought by respondents in the Small Claims Court of the City and County of San Francisco, State of California, to recover wages from their employer Burgermeister Brewing Corporation, the Petitioner herein. The jurisdiction of the Small Claims Court is

limited by law to claims not exceeding $150.00 (Calif. Code of Civil Procedure, Sec. 117); the proceedings are of an informal nature and the parties are not permitted representation by counsel (Sec. 117j).

Respondent Aldini recovered judgment in the Small Claims Court for wages in the amount of $23.30 and $1.00 costs; respondent Foley, for $93.20 and $1.00 costs; and respondent Lindstrom, for $46.60 and $1.00 costs (Cl. Tr. pp. 9A, 12A, 14A). Petitioner, defendant below, appealed to the Superior Court of the City and County of San Francisco, which after trial de novo as provided in California Code of Civil Procedure, Section 117j, affirmed the judgments (Cl. Tr. pp. 75, 76 and 77). Petitioner's motion for a new trial was thereafter denied (Cl. Tr. p. 94).

The nature and size of the claims involved invite application of the maxim de minimis (see: *Richman v. California*, 363 U.S. 821, 4 L. ed. 2d 1517, 80 S. Ct. 1256).

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## STATEMENT OF THE CASE

Respondents have no particular quarrel with Petitioner's Statement of the Case, which appears to be factually correct, except in one vital respect.

Petitioner gives the impression that the collective bargaining agreement between it and the Teamster Brewery and Soft Drink Workers Joint Board of California provided a remedy by way of arbitration which was available to respondent employees and that they failed to avail themselves of this remedy.

Such is not the case at all.

The provisions with respect to arbitration appear in Section 29 of the collective bargaining agreement, which section is set forth in full in the Appendix hereto. This Section, entitled "Adjustment of Disputes", permits only the Local Union, or the Individual Employer, in the local area, in a dispute involving discharge or other disciplinary action (Subsection (a)(3)) or the Teamster Brewery and Soft Drink Workers Joint Board of California and a signatory Association, in disputes involving interpretation of the agreement (Subsection (a)(4)), to invoke the procedures of arbitration.

Subsection (a)(4) of the Agreement, which is the particular provision relied upon by Petitioner, provides that "any grievance which involves interpretation of this agreement . . . shall be submitted to arbitration through a signatory Association and the Joint Board . . .".

Nowhere in Section 29, or in any other part of the Agreement, is it provided that an aggrieved employee may invoke the procedures of arbitration or require the Joint Board to invoke them upon his behalf.

Neither the Joint Board nor the Employer Association representing the employer having demanded arbitration under Subsection (a)(4), respondents perforce had to, and did, commence their actions in the Small Claims Court of the City and County of San Francisco, State of California, or be left without any remedy at all.

Viewed in the light of the foregoing, the questions which Petitioner states are presented for review are not in fact presented at all, since they turn upon the false assumptions that "the agreement provides for arbitration of such dispute" and "such agreement specifically provides machinery for arbitration of such disputes."

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## ARGUMENT

### I

### PETITIONER HAVING FAILED TO PRESENT ANY FEDERAL QUESTION IN THE STATE COURTS OR TO EXHAUST ITS REMEDIES UNDER STATE LAW IS NOT ENTITLED TO HAVE CERTIORARI ISSUED.

Although Petitioner in its brief before the Superior Court of the State of California makes passing reference to decisions of this Court having to do with the effect of federal substantive law under Section 301 (a) of the Labor-Management Relations Act, 1947, the question of federal pre-emption which is urged at length in the Petition was never presented to the state courts.

In *Congress of Industrial Organizations v. McAdory*, 325 U.S. 472, 89 L. ed. 1741, this Court held that it had no jurisdiction to determine whether a state labor statute making it unlawful for executive or supervisory personnel to be members of a labor organization was in conflict within the National Labor Relations Act and therefore void, because the question of pre-emption of the federal Act was never presented to the State Courts and was not passed upon by them. (See

also: *Rohr Aircraft Corp. v. County of San Diego*, 362 U.S. 628, 80 S. Ct. 1050, 4 L. ed. 2d 1050, and cases therein cited.)

But in addition, Petitioner failed at any stage of the proceedings in the state courts to move for a stay as it was entitled to do under California State Law, if in fact as Petitioner now contends, the matter was referable to arbitration.

Section 1284 of the California Code of Civil Procedure provides:

> "1284. Stay of civil action. If any suit or proceeding be brought upon any issue arising out of an agreement providing for the arbitration thereof, the court in which such suit or proceeding is pending, upon being satisfied that the issue involved in such suit or proceeding is referable to arbitration, shall stay the action until arbitration has been had in accordance with the terms of the agreement; provided, that the applicant for the stay is not in default in proceeding with such arbitration."

The California courts have held that the failure to make application for a stay under the above section of the Code of Civil Procedure amounts to a waiver of the right to demand arbitration. Thus, in *Landreth v. South Coast Rock Co.*, 136 Cal. App. 457, the Court said:

> "It is well settled that ordinarily a right given by statute or created by contract may be waived by the party in whose favor it exists. Dicta in the case of Palmer v. Fix, 104 Cal. App. 562, 571 (286 Pac. 498), would indicate that where a suit

> was pending, involving a contract containing an arbitration agreement, and the defendant made no request or application to the court to stay the action pending such arbitration, he waived his right to demand such a proceeding and submitted to the jurisdiction of the court to render judgment upon the merits. While this is dicta it would seem to be well founded in reason. (2) The act in question does not by its terms seen to intend to deprive the superior court of jurisdiction of cases involving contracts with arbitration agreements, but merely to provide a summary means by which the arbitration agreement can be enforced should one of the parties desire to rely upon it. It would seem to be the right of the party to invoke this summary power of the court which would be waived if he did not avail himself of it."

Petitioner made no application to stay the actions by respondents either in the Small Claims Court or in the Superior Court. Instead, it proceeded to trial in the Small Claims Court and later to a trial de novo upon its appeal to the Superior Court, without objection, until at the very end of the trial de novo before the Superior Court it orally moved for judgment because of the alleged failure of respondents, plaintiffs below, to put the matter to arbitration (Tr. p. 30). The motion was denied (Rep. Tr. p. 31). Even granting that a motion for judgment orally made at the close of the testimony would meet the requirement of an application for a stay of the proceedings under the code section above cited, it was properly denied under California law because made

for the first time on appeal (*Palmer v. Fix,* 104 C.A. 562).

Having thus waived its right to insist upon arbitration by failing to make proper application for a stay in the State court, Petitioner is without right to petition for certiorari (*Copper Weld Steel Co. v. Ind. Acc. Com.,* 324 U.S. 780, 89 L. ed. 1363, 65 S. Ct. 1006).

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## II

### THE PETITION IN ANY EVENT PRESENTS NO SUBSTANTIAL QUESTION FOR DECISION AND SHOULD BE DENIED.

Aside from these procedural questions, as respondent employees see it, the real question presented on the record is whether the policy of federal substantive law under Section 301 (a) of the Labor-Management Relations Act, 1947, in favor of arbitration of labor disputes, goes so far as to oust the State Courts of jurisdiction of an employee's uniquely personal claim for wages against his employer when he is without the right or power to submit to arbitration and the Union and employer principals to the collective bargaining agreement fail or refuse to submit it.

The power of the Federal Courts to enforce the national policy in favor of arbitration of labor disputes, as declared by the Court in *Textile Workers v. Lincoln Mills,* 353 U.S. 448, 1 L. ed. 2d 972, 77 S. Ct. 912, is based squarely upon Section 301 (a) of the Act (29 U.S.C. Sec. 185). This Court said:

"From the face of the Act it is apparent that Section 301 (a) and 301 (b) supplement one another. Section 301 (b) makes it possible for a labor organization, representing employees in an industry affecting commerce, to sue and be sued as an entity in the federal courts. Section 301 (b) in other words provides the procedural remedy lacking at common law. Section 301 (a) certainly does something more than that. Plainly it supplies the basis upon which the federal district courts may take jurisdiction and apply the procedural rule of Section 301 (b) . . .".

* * * * * * *

"The question then is, what is the substantive law to be applied in suits under 301 (a)? We conclude that the substantive law to apply in suits under 301 (a) is federal law which the courts must fashion from the policy of our national labor laws. The Labor-Management Relations Act expressly furnishes some substantive law. It points out what the parties may or may not do in certain situations. Other problems will lie in the penumbra of express statutory mandates. Some will lack express statutory sanction but will be solved by looking at the policy of legislation and fashioning a remedy that will effectuate that policy. The range of judicial inventiveness will be determined by the nature of the problem. Federal interpretation of the federal law will govern, not State law. But State law, if compatible with the purpose of 301 (a), may be resorted to in order to find the rule that will best effectuate the federal policy. Any State law applied, however, will be absorbed as Federal law and will not be an independent source of private right."

Since Section 301 (a) is thus made the source, it must also be the measure, of the power to fashion the federal law which is to govern.

Decisions of this Court already give clear indication that the limitations upon the power to fashion will come from at least two different directions.

In the first place, Mr. Justice Frankfurter in *Association v. Westinghouse Electric Corporation*, 348 U.S. 437, 99 L. ed. 510, 75 S. Ct. 488, said:

> "Considering the nature of a collective bargaining contract, which involves the correlative rights of employer, employee and union, we might be disposed to read § 301 as allowing the union to sue in this case. With due regard to the constitutional difficulties which would be raised, and in view of the fact that such an interpretation would bring to the federal courts an extensive range of litigation heretofore entertained by the States, we conclude that Congress did not will this result. There was no suggestion that Congress, at a time when its attention was directed to congestion in the federal courts, particularly in the heavy industrial areas, intended to open the doors of the federal courts to a potential flood of grievances based upon an employer's failure to comply with terms of a collective agreement relating to compensation, terms peculiar in the individual benefit, which is their subject matter and which, when violated, give a cause of action to the individual employee. The employees have always been able to enforce their individual rights in the state courts. They have not been hampered by the rules governing unincorporated associations. To this extent, the collective bargaining contract has always been 'enforceable.'

Nowhere in the legislative history did Congress discuss or show any recognition of the type of suit involved here, in which the union is suing on behalf of employees for accrued wages. Therefore, we conclude that Congress did not confer on the federal courts jurisdiction over a suit such as this one."

Mr. Chief Justice Warren and Mr. Justice Clark in a concurring opinion said:

"We agree with the decision but not with all that is said in the opinion. The only question we see here is one of statutory interpretation. For us the language of § 301 is not sufficiently explicit nor its legislative history sufficiently clear to indicate that Congress intended to authorize a union to enforce in a federal court the uniquely personal right of an employee for whom it had bargained to receive compensation for services rendered his employer. Thus viewed, it becomes unnecessary for us either to make labor policy or to raise constitutional issues."

And Mr. Justice Reed also concurring, said:

"The reason, I think, that this union cannot recover from the employer in this suit under § 301 is that the claim for wages for the employees arises from separate hiring contracts between the employer and each employee. The union does not undertake to do work for the employer or even to furnish workers. The duty, if any there be, to pay wages to an employee arises from the individual contract between the employer and employee, not from the collective bargaining agreement. Therefore there is set out no violation of a contract between an employer and a labor or-

> ganization as is required to confer jurisdiction under § 301. The facts show an alleged violation of a contract between an employer and an employee—a situation that is not covered by the statute."

In passing, we note the similarity between the rights asserted by the labor organization upon behalf of the individual employees, which this Court held to be "uniquely personal", in the above case and those asserted by respondent employees in the proceedings below. Both involved claims for wages due employees under collective bargaining contract for periods of time when they were on lay-off or otherwise not working. Petitioners in fact appear to concede the uniquely personal nature of the claims of respondents.

Secondly, in *Steelworkers v. Warrior & Gulf Navigation Co.*, 363 U. S. 574, 4 L. ed. 2d 1409, 80 S. Ct. 1347, this Court said:

> "The Congress, however, has by §301 of the Labor Management Relations Act, assigned the courts the duty of determining whether the reluctant party has breached his promise to arbitrate. For arbitration is a matter of contract and a party cannot be required to submit to arbitration any dispute which he has not agreed so to submit. Yet, to be consistent with congressional policy in favor of settlement of disputes by the parties through the machinery of arbitration, the judicial inquiry under §301 must be strictly confined to the question whether the reluctant party did agree to arbitrate the grievance or agreed to give the arbitrator power to make the award he made. An order to arbitrate the particular griev-

> ance should not be denied unless it may be said with positive assurance that the arbitration clause is not susceptible to an interpretation that covers the asserted dispute. Doubts should be resolved in favor of coverage."

The area of impact of the newly established federal substantive law is therefore measured both by the nature of the right asserted, i.e., whether it is a "uniquely personal right" of the employees, or a right asserted by a labor organization upon behalf of the employees represented by it as a class, and by the extent of the contract provision for arbitration.

The question whether a uniquely personal claim of an employee would fall within the area of impact of the federal substantive law under Section 301 (a), if it were expressly made the subject of arbiration under the collective bargaining contract is not here presented, because as we have shown, the employee was not given the right under the collective bargaining agreement to invoke the procedures of arbitration.

The precise question here presented is whether the thrust of the national policy is such as to oust the state courts of jurisdiction and to leave the employees without a remedy, when the collective bargaining representatives, both employer and employee, fail to invoke the procedures of arbitration upon their behalf.

The suggestion implicit in *Warrior & Gulf Navigation Co.* is that, if the claim is found not to be subject to arbitration, the state courts shall have jurisdic-

tion to grant the traditional remedies for breach of contract.

In *United Construction Workers v. Laburnum Construction Corp.*, 347 U.S. 656, 98 L. ed. 1025, 74 S. Ct. 833, this Court in considering the pre-emptive impact of other sections of the 1947 Act dealing with regulation of unfair labor practices, said:

> "Petitioners contend that the Act of 1947 has occupied the labor relations field so completely that no regulatory agency other than the National Labor Relations Board and no court may assert jurisdiction over unfair labor practices as defined by it, unless expressly authorized by Congress to do so. They claim that state courts accordingly are excluded not only from enjoining future unfair labor practices and thus colliding with the Board, as occurred in Garner v. Teamsters Union, 346 U. S. 485, 33 LRRM 2218, but that state courts are excluded also from entertaining common-law tort actions for the recovery of damages caused by such conduct. The latter exclusion is the issue here. In the Garner case, Congress had provided a federal administrative remedy, supplemented by judicial procedure for its enforcement, with which the state injunctive procedure conflicted. Here Congress has neither provided nor suggested any substitute for the traditional state court procedure for collective damages for injuries caused by tortious conduct. For us to cut off the injured respondent from this right of recovery will deprive it of its property without recourse or compensation. To do so will, in effect, grant petitioners immunity from liability for their tortious conduct. We see no substantial reason for reaching such a result. The

> contrary view is consistent with the language of the Act and there is positive support for it in our decisions and in the legislative history of the Act."

Certainly the United States Congress has neither provided nor suggested in Section 301 (a) any substitute for the traditional state court procedures for employees to collect their wages, or to vindicate any other of their uniquely personal rights. It is not to be anticipated that the "range of judicial inventiveness", to which the development of a large part of the new body of federal law is admittedly left, will be so exercised, within the limits already fixed by this Court, as to deprive the employees of these traditional remedies, and to leave them, at least in the situation here presented, without any remedy at all.

The policy of the federal substantive law is in favor of arbitration of labor disputes when the collective bargaining contract provides for such arbitration. There is nothing inconsistent with this policy, in leaving employees free to pursue their traditional state court remedies when the collective bargaining contract does not so provide.

The 1947 Act itself recognizes the right of employees to present their own grievances individually. The proviso to Section 9 (a) (29 U.S.C. Sect. 159 (a)) is as follows:

> " . . . Provided, that any individual employee or group of employees shall have the right at any time to present grievances to their employer and to have such grievances adjusted without the in-

> tervention of the bargaining representative, so long as the adjustment is not inconsistent with the terms of a collective bargaining contract or agreement then in effect. Provided further, that the bargaining representative has been given an opportunity to be present at such adjustment."

The policy of the California law, which the state courts applied in the proceedings below, is entirely consistent with the policy of the federal substantive law announced in *Warrior & Gulf Navigation Co.*, supra.

Agreements to arbitrate, generally speaking, are declared to be valid and enforceable by Section 1280 of the California Code of Civil Procedure.

In *Levy v. Superior Court*, 15 Cal. 2d 692, the Supreme Court of the State of California held that arbitration provisions in collective bargaining contracts are valid and enforceable under the aforesaid section of the Code of Civil Procedure. The Supreme Court of the state said:

> "It is further brought to our attention that arbitration under collective bargaining agreements has been one of the most potent factors in establishing and maintaining peace and protection in industry; and that organized labor is more and more resorting to the courts for recognition of the lawfulness and enforceability of collective bargaining agreements, rather than electing to settle its disputes by other methods. . . ".

In line with the above, it has since become the firmly established law of the State of California that

where arbitration is provided in a collective bargaining contract, the parties must exhaust that remedy before resort to the courts. Thus in *Cone v. Union Oil Company*, 129 Cal. App. 2d 558, it is said:

> "It is the general rule that a party to a collective bargaining contract which provides grievance and arbitration machinery for the settlement of disputes within the scope of such contract must exhaust these internal remedies before resorting to the courts in the absence of facts which would excuse him from pursuing such remedies. (*Barker v. Southern Pac. Co.*, (9th Cir.) 214 F.2d 918; *Wallace v. Southern Pac. Co.*, 106 F. Supp. 742 (N. D. Calif.); *Huberl v. Southern Pac. Co.*, 94 F. Supp. 11 (N. D. Calif.); *Hingle v. Transcontinental & Western Air, Inc.*, 113 F. Supp. 897, 899; *Transcontinental & Western Air, Inc. v. Koppal*, 345 U.S. 653 (73 S.Ct. 906); *Reed v. St. Louis S.W.R. Co.*, (Mo. App.) 95 S.W. 2d 887.) This rule, which is analogous to the rule requiring the exhaustion of administrative remedies as a condition precedent to resorting to the courts (2 Cal. Jur. 2d 304, §184), is based on a practical approach to the myriad problems, complaints and grievances that arise under a collective bargaining agreement. It makes possible the settlement of such mattters by a simple expeditious and inexpensive procedure, and by persons who, generally, are intimately familiar therewith. (*Utah Const. Co. v. Western Pac. R. Co.*, 174 Cal. 156 (162 P. 631).) . . . Such procedures, which have been worked out and adopted by the parties themselves, must be pursued to their conclusion before judicial action may be instituted unless circumstances exist which would excuse the failure to

follow through with the contract remedies. (*Barker v. Southern Pac. Co.*, supra; *Wallace v. Southern Pac. Co.*, supra; *Huberl v. Southern Pac. Co.*, supra; *Transcontinental & Western Air, Inc. v. Koppal*, supra.)".

In a very recent decision, *Posner v. Grunwold-Marx, Inc.*, 56 A.C. 159, the California Supreme Court rejected the so-called Cutter-Hammer doctrine (*Int. Assn. of Machinists v. Cutter-Hammer, Inc.*, 271 App. Div. 917, 67 N.Y.S. 2d 317) which was denounced by this Court in *United Steel Workers v. American Mfg. Co.*, 363 U.S. 564, 4 L. ed. 2d 1403, 80 S. Ct. 1343, and expressly accepted the statement of policy expressed by this Court in *Warrior & Gulf Navigation Co.* The California Supreme Court said:

"Our own state policy favors arbitration provisions in collective bargaining agreements and recognizes the important part that they play, in helping to promote industrial stabilization. Section 1280 of the Code of Civil Progedure provides that 'A provision in a written contract to settle by arbitration a controversy thereafter arising out of the contract or the refusal to perform the whole or any part thereof . . . shall be valid, enforceable and irrevocable . . .' And Section 1282 of the Code of Civil Procedure provides in part that 'A party aggrieved by the failure, neglect or refusal of another to perform under an agreement in writing providing for arbitration may petition . . . for an order directing that such arbitration proceed in the manner provided for in such agreement.' In holding those provisions applicable to collective bargaining agreements, the

> court in Levy vs. Superior Court, 15 Cal. 2d 692, noted at page 704, that arbitration under collective bargaining agreements has been one of the most potent factors in establishing and maintaining peace and protection in industry . . .' Chavez vs. Sargent, 52 Cal. 2d 162, at page 197, declared that 'State laws as they should be interpreted and applied, at least since the 1947 and subsequent enactments, continue to permit, to encourage and protect collective bargaining agreements which have been freely negotiated and entered into by and between employees lawfully authorized organizations and their employers whereby the interests of each party may be advanced.' Thus, our state policy does not substantially differ from 'the present federal policy which is to promote industrial stabilization through the collective bargaining agreement'" (*United Steelworkers v. Warrior & Gulf Navigation Co.*, 363 U.S. 574, 578).

But consistently with the federal policy expressed in *Warrior & Gulf Navigation Company*, supra, by this Court, the Supreme Court of the State of California has also held that when the parties have not agreed to arbitration, they shall have the right to resort to the courts. Thus, in *McCarroll v. L. A. County*, 49 Cal. 2d 45, the California Supreme Court said:

> "It is urged that arbitration provisions in collective bargaining agreements should when possible be construed broadly to cover all disputes between the parties to the end that the contract will provide a complete system of government for the parties, a system far more satisfactory than any of the courts can provide, and because estab-

> lished by the parties themselves, more likely to lead to industrial peace. We do not dispute the attractiveness of the ideal, but it does not justify overriding the parties' intentions and forcing on them a method of decision wholly unexpected in its application. As Mr. Justice Cardozo pointed out in Marchant vs. Mead-Morrison Mfg. Co., 252 N. Y. 284 (169 N.E. 386, 391, 393) Courts are not at liberty to shirk the process of construction under the empire of a belief that arbitration is beneficent, any more than they may shirk it if their belief happens to be to the contrary. No one is under a duty to resort to these conventional tribunals, however helpful their processes, except to the extent that he has signified his willingness . . . (The contracting parties) . . . are not to be trapped by a strained and involved construction of words of doubtful import into an abandonment of legal remedies, unwilled and unforeseen."

The right of an employee to receive prompt and full payment of his wages is fully implemented by the California Labor Code, Sections 200-226, inclusive; the employee's right to sue for his wages, as might be expected, receives express recognition in Section 218 of the Labor Code. The failure of the employer to pay wages is punishable as a misdemeanor under Sections 215 and 216 of the same Code.

Petitioner's theory of pre-emption would deprive respondents of these fundamental rights and leave them entirely without a remedy.

We are confident that this is not the policy of the federal substantive law.

## CONCLUSION

It is respectfully urged that Petitioner has not presented any question for review by this Court and that the petition should be denied.

Dated, September 18, 1961.

Respectfully submitted,

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**(Appendix Follows.)**

## EXCERPTS FROM THE APPLICABLE COLLECTIVE BARGAINING AGREEMENT

### SECTION 29. ADJUSTMENTS OF DISPUTES.

(a) Any dispute or grievance arising at or involving an establishment subject to this Agreement shall be disposed of as follows:

(1) Such dispute or grievance shall be presented orally or in writing at the shop level between the steward and the Individual Employer's representative. If action on the dispute within two (2) days is unsatisfactory, the grievance may be stated in writing and delivered to the Individual Employer or the Local Union involved within four (4) days of its occurrence. If a dispute does not arise at job level, it may be stated in writing and delivered promptly to the Individual Employer or to the Local Union or Union by the Individual Employer or any signator.

(2) The issue presented in such written statement shall be considered by representatives of the parties involved for adjustment in accordance with the terms of this agreement. Should such representatives fail to agree on settlement within five (5) days after submission to them, either party may ask that the dispute be submitted to arbitration.

(3) If the principal issue in dispute is one as to facts regarding discharge or other disciplinary action, and the basic issue is not one of the interpretation of the contract that may create a precedent, the matter may be submitted to arbitration in the local area by the Individual Employer or his representative and

Local Union involved under the terms of a written agreement to arbitrate, stating the nature of the dispute. Such agreement to arbitrate shall be submitted by the parties to the Teamster Brewery & Soft Drink Workers Joint Board of California, to the California Brewers Association and the California Beer Wholesalers Association, Inc at least five (5) days before the hearing before the arbitrator. The parties shall advise the Joint Board and such associations of the appointment of the arbitrator and of the time for hearing. The parties shall then proceed to arbitrate the matter in controversy subject to the right of either the California Brewers Association or the California Beer Wholesalers Association, Inc. or the Joint Board to appear and move that the matter be transferred for hearing under sub-paragraph (4) hereof. The parties shall be limited strictly to the determination of the facts and the application of clear provisions of the agreement as written, to such facts. The decision of the arbitrator within his powers on a dispute properly before him shall be final and binding on the parties to the proceeding, but it shall not constitute a precedent under this agreement. Said decision shall be made within ten (10) days of the appointment of the arbitrator. All expenses and charges of the arbitrator and the cost of the hearing room and reporter, if any, shall be shared by the Local Union and the Individual Employer involved. Any question as to whether there has been an improper action in applying the agreement or by proscribed interpretation of the agreement may be considered under sub-paragraph (4) hereof.

(4) Any grievance that involves the interpretation of this agreement or does not relate solely to discharge or other disciplinary matters or raises a question of jurisdiction of an arbitrator, shall be submitted to arbitration through a signatory association and the Joint Board as follows:

Representatives of the California Brewers Association or the California Beer Wholesalers Association, Inc. as the case may be and the Joint Board may meet in an attempt to dispose of the grievance without formal arbitration proceedings, and after filing under (1) or handling under (2) or (3). At any time either the Joint Board or a signatory association may ask for the appointment of an impartial arbitrator and such parties shall then select an impartial and competent third person as arbitrator. The matter shall promptly be submitted to arbitration. The arbitrator's jurisdiction shall extend to all issues arising between such parties. His powers shall be limited strictly to the application and interpretation of this agreement as written; he shall have no power to add to or subtract from the agreement, whether by imposing any obligation or restraint, granting any right or privilege or power, or otherwise. The arbitrator's decision within the stated powers on a dispute properly before him shall be final and binding on all persons. All expenses and charges of the arbitrator and the cost of the hearing room and reporting shall be borne equally by the parties. A signatory association shall have the right in such arbitration to be heard to the extent of its interest.

(b) Pending settlement of any dispute between the parties in accordance with this section, there shall be no stoppage of work either on the part of the Individual Employer, the employees, any Local Union, or the Union; providing that said work shall continue in the manner in which it had previous to the arising of the dispute and prompt submission of it to the procedures of this paragraph, and that such work shall be performed, or such payments made, as had been done or paid previous to the arising of the dispute and the prompt submission of it for decision under this paragraph. It is the considered and deliberate intention of the Union, the Local Unions, the Individual Employers and the other signators to avoid, insofar as possible, the stoppage of work.

(c) Any strike or lockout prior to the rendering of a decision under paragraph (a) hereof, except as is privileged under other paragraphs of this Agreement, or any strike or lockout in protest of any decision under paragraph (a) shall be a violation of this Agreement. The arbitrator is empowered to impose appropriate penalty upon the party guilty of such violation.

(d) Should the parties be unable to agree upon a person to act as arbitrator within seven (7) days after arbitration has been demanded in accordance with the terms of this section, either party may request the Chief Judge of the United States District Court for the Northern District of California to appoint an arbitrator to dispose of the issue. All arbitrators' decisions shall be in writing and acknowledged in California before a notary public.

FILED
SEP 28 19[illegible]
JAMES R. BROWNING, Clerk

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1961
No. 340

BURGERMEISTER BREWING CORPORATION,
*Petitioner,*

*vs.*

RICHARD C. LINDSTROM, ARCHIE ALDINI, and JOHN P. FOLEY,
*Respondents.*

## Answer to Brief of Respondents in Opposition to Petition for Writ of Certiorari.

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*Respondents.*

## Answer to Brief of Respondents in Opposition to Petition for Writ of Certiorari.

### I.

### Respondents' Contentions That Petitioner Failed to Present Any Federal Question in the State Courts or to Exhaust Its Remedies Under State Law Are Wholly Without Merit.

Respondents argue that Petitioner only made "passing reference" to the requirements of the federal substantive law in the courts below. On the contrary, the fact that the disputed issue of contract interpretation must be resolved by arbitration and not by the courts, as required by federal law and as enunciated by this Court, was raised and argued in all of the proceedings below. This included a Motion for Judgment at the trial upon the ground that the dispute must be resolved by arbitration and not by the courts. The mo-

tion was denied [Rep. Tr. pp. 31-32; see also Rep. Tr. p. 16]. The matter was extensively argued including reliance upon the *Lincoln Mills* and *Steelworkers* decisions of this Court [Clk. Tr. pp. 80 *et seq.*, 44 *et seq.*, 55-56, and 79 *et seq.*]. Indeed, the Division of Labor Law Enforcement of the State of California dismissed the complaint filed with that agency upon this ground as urged by Petitioner even prior to the court action having been filed by Respondents.

Respondents also contend that by not seeking a stay of the state court action Petitioner "waived its right to insist upon arbitration" (p. 7). This assumes that Petitioner had an obligation or desire to demand arbitration. It had neither. There was no duty upon Petitioner to initiate any proceeding to require it to pay money it felt it did not owe.

Respondents filed the state court action. Petitioner in response thereto contended that *if the disputed issue of contract interpretation were to be determined* it must be determined under the contractually agreed arbitration procedure and not by the courts. Whether or not it was to be determined was not a choice to be made by Petitioner. There was no reason for or obligation upon it to demand arbitration. If arbitration was desired Petitioner of course would arbitrate in accordance with contract procedures. If arbitration was not desired Petitioner was content not to pay the disputed amount.

Petitioner therefore had no occasion to make application for a stay under Section 1284 of the California Code of Civil Procedure. That section is wholly inapplicable here. There was nothing for Petitioner to waive.

II.

**Respondents Contend That an Individual Employee May Resolve a Grievance Under a Collective Bargaining Agreement by Resort to the State Courts Even Though His Union Determines Not to Process Such Grievance Through the Contractual Grievance and Arbitration Procedure. This Is in Direct Conflict With Federal Substantive Law.**

Respondents' Brief in Opposition to the Petition for Writ of Certiorari emphasizes the importance of the questions presented by the Petition and the necessity that they be resolved by this Court.

In support of the decisions of the courts below, Respondents state the California law to be that where a disputed interpretation of a collective bargaining agreement exists between an employer and a union which may affect the compensation of an individual employee, and the union and the employer determine not to submit the dispute to arbitration under the applicable arbitration provision, the employee may independently resolve the dispute by an action in the state courts.

In other words, the individual employee may overrule the decision of the union representing him; if the union in the administration of the agreement and in applying the "common law of the plant" determines not to process an employee's grievance through the arbitration procedure, the employee may then seek to enforce his grievance by an action in the state courts. This can be done, Respondents say, despite the fact that the parties had bargained for the interpretation of the agreement in disputed cases through the arbitration process and not by the courts.

Respondents throughout their brief ignore the undisputed fact that *the validity of their claims depends upon a disputed interpretation of the provisions of the collective bargaining agreement,* which disputed interpretation can *only* be resolved by arbitration.

We submit that the result for which Respondents contend would be disastrous to the peaceful and orderly settlement of industrial disputes. It would be directly contrary to the federal substantive law and the policy expressed by this Court in the *Steelworkers* cases.

For the foregoing reasons and for those stated in the Petition, we respectfully urge that the Petition be granted.

Respectfully submitted,

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September 26, 1961.

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